

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of TERRI PARKER and  
WILLIAM PARKER.

TERRI PARKER,  
Respondent,

v.

WILLIAM PARKER,  
Appellant.

A095460

(Contra Costa County  
Super. Ct. No. D98-04629)

William Parker appeals from an order vacating a stipulated judgment in a dissolution proceeding. He raises several challenges to the court's granting of relief under Code of Civil Procedure section 473.<sup>1</sup> We conclude that the trial court's exercise of discretion is supported by the evidence and affirm.

BACKGROUND

Appellant and respondent Terri Parker were married in May of 1985 and separated in September of 1998. After lengthy negotiations between the parties and their attorneys, they entered into a stipulated judgment distributing their property. The stipulation was

---

<sup>1</sup> Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

signed in February of 2000 and entered by order of the court on August 3, 2000.<sup>2</sup> Portions of the judgment incorporated issues that the trial court had determined and portions included matters the parties had negotiated. On September 15, 2000, respondent filed a motion to correct the judgment.

Respondent's motion, on a judicial council form, stated that it was to "correct/amend [the] judgment," and contended that there was a mathematical error in the judgment. The error, stated simply, was that respondent was charged twice with receipt of the same two Home Savings accounts, which resulted in overstatement of the value of the assets assigned to her by approximately \$47,000. Correction of the error would require appellant to pay an additional equalizing payment of \$23,679.

Respondent attached two pages from the stipulated judgment and an earlier asset disclosure statement. Page two of the stipulated judgment contained a listing of assets assigned to each party. The assets awarded to respondent included a life insurance policy, a Ford Taurus automobile, Home Savings account #1 valued at \$36,610, Home Savings account #2 valued at \$10,749, and an item labeled "misc. accounts" valued at \$97,874.

Page three of the stipulated judgment listed the miscellaneous accounts as nine categories of stockholdings, identifying the company and approximate number of shares in each category and showing a total value of \$97,874. The judgment did not show individual values for each category of shares. Overall, respondent received assets valued at \$164,003. Appellant received assets valued at \$228,279. Those two amounts were added together and divided by two to give an equal distribution of \$196,156 to each party.<sup>3</sup> Appellant was required to make an equalizing payment of \$32,123 to respondent.

---

<sup>2</sup> At least a part of the delay in entering the judgment appears to have been caused by the clerk's refusal to file the document because some of the revisions had been made in red ink.

<sup>3</sup> As the trial court noted, even the addition of the two sums was incorrect. The amount of the addition error was insubstantial, and is not an issue on appeal.

To demonstrate the error, respondent attached a page from a prior asset disclosure statement showing 11 categories of assets, with values assigned to each category. That statement noted: “[t]he following community assets are yet to be divided; the values shown are [respondent’s] values as of the date of separation . . . .”<sup>4</sup> The eleven categories of assets included the same nine stock accounts listed as miscellaneous accounts in the judgment and the two Home Savings accounts. The total value of all eleven accounts listed on the disclosure statement (including the two Home Savings accounts), was \$97,874, the exact value assigned to the nine miscellaneous stock accounts listed in the stipulated judgment.

Appellant’s counsel attached a declaration stating that the stipulated judgment was “cobbled together from the trial court’s decision and Terri and Bill’s agreement.” The stipulated judgment was nine pages long, with many handwritten interlineations, each of which had been initialed. Dates were changed, whole paragraphs were deleted and additional paragraphs were inserted in longhand. Respondent’s counsel admitted that when he prepared the list of assets for the stipulated judgment, he inadvertently duplicated the two Home Savings accounts in the assets assigned to respondent.

Respondent’s motion was set for a hearing in October of 2000 and apparently continued to November. The motion relied on section 473, without designation of a subdivision, as the basis for relief, although, as the court subsequently noted, the motion appeared to be based on subdivision (d) regarding clerical errors.<sup>5</sup> When the parties

---

<sup>4</sup> Respondent’s motion indicated that the asset disclosure statement contained appellant’s valuation of the accounts. The asset disclosure statement had appellant’s counsel’s name and fax number at the top of the page. Appellant’s declaration did not object to the accuracy of the valuation, but stated that it was from “a very early status/motion statement.”

<sup>5</sup> Subdivision (d) provides: “(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.”

appeared in court in November, appellant's counsel argued that respondent could not obtain relief unless she agreed to set aside the entire stipulated judgment. In December of 2000, in response to appellant's argument, respondent delivered a letter agreeing to set aside the stipulated judgment. Respondent also filed points and authorities arguing that the court could grant the motion under either subdivision (d) or the discretionary provisions of subdivision (b).

The matter was heard on March 12, 2001. At that time, respondent moved to amend the pleadings to conform to proof to be produced at the hearing, to allow the court to vacate the judgment due to mistake. Appellant and respondent testified at length about the genesis of the agreement. Respondent testified that appellant had made the \$32,123 in equalization payments required by the stipulated judgment and that she was prepared to repay that amount if the court vacated the judgment.

Following the hearing, the court granted respondent's motion and vacated the property distribution judgment on April 25, 2001.<sup>6</sup> In a written statement of decision, the court found no clerical error under section 473, subdivision (d), but granted relief under subdivision (b) based on an inadvertent or excusable mistake. The court stated that while appellant focused solely on the amount of his equalizing payment to respondent, respondent had agreed to set the payment arithmetically. The court concluded that in setting out the mathematical calculations, respondent or her counsel had mistakenly counted the Home Savings accounts twice. The court expressly held that respondent acted quickly to seek relief after she reviewed the final version of the judgment.<sup>7</sup>

An order was entered vacating the property judgment and appellant appealed.

## DISCUSSION

Appellant argues that section 473 is not available to test the validity of a marital settlement agreement, that respondent's motion was not timely and that there was no

---

<sup>6</sup> The status judgment of dissolution was exempted from the judgment.

<sup>7</sup> The court also denied cross-motions for attorney fees, and no issue is raised regarding fees.

excuse for the delay in seeking relief. Appellant also contends that the court abused its discretion in granting relief because respondent, who caused the mistake, has not repaid the money appellant paid under the terms of the stipulated judgment. Appellant challenges the trial court's finding that there was an error in the agreement. Appellant also argues that his due process rights were violated because he did not receive notice that respondent sought relief on the ground of mistake, rather than clerical error. For the following reasons, we reject appellant's contentions.

#### Standard of Review

Section 473, subdivision (b) authorizes the trial court, "upon any terms as may be just, [to] relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." "It is well settled that a motion for relief from default under Code of Civil Procedure section 473 is addressed to the sound discretion of the trial court and that its ruling thereon will not be disturbed on appeal in the absence of a clear showing of abuse of discretion." [Citations.] (*Lipson v. Jordache Enterprises, Inc.* (1992) 9 Cal.App.4th 151, 157; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399.) We address appellant's arguments in light of that standard of review.

#### A Section 473 Motion May Be Used To Vacate A Stipulated Judgment

Relying on *Olson v. Olson* (1957) 148 Cal.App.2d 479 (*Olson*), appellant argues that "the validity of a marital settlement agreement cannot be tested by way of motion under 473(b)." (Paraphrasing Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2001) ¶ 16:70, p. 16-17.) The problem in *Olson*, however, was that the settlement agreement expressly stated: "this Agreement shall not depend for its effectiveness on [the court's] approval nor be affected thereby." (*Olson, supra*, at p. 487.) The petition sought only to vacate the interlocutory decree approving the settlement agreement on the ground that the petitioner did not intend to be divested of property rights affected by the settlement agreement. (*Olson, supra*, at pp. 481-482.) The appellate court, quoting other cases, stated that a trial court could only vacate the

interlocutory judgment and had no power to modify it to correct an error of law. (*Olson, supra*, at pp. 487-488.) Under the circumstances of the case, the court affirmed the order vacating the interlocutory judgment, but reversed the portion of the lower court's order that vacated and set aside the property settlement agreement. (*Olson, supra*, at pp. 481, 489.)

The stipulated judgment in this case concerned a combination of issues decided by the court and issues negotiated by the parties. It contained no statement that it would not be affected by the court's approval. In fact, some portions of the stipulated judgment reserved the court's jurisdiction over specified issues, such as child custody, disposition of retirement accounts and division of the proceeds of a pending lawsuit. One paragraph generally reserves the court's jurisdiction over the entire division of community property. This case is more appropriately considered in light of *In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273 (*Jacobs*). "Where a property settlement agreement has been incorporated in the interlocutory dissolution decree, the agreement merges into and is superseded by the decree and 'the value attaching to the separation agreement is only historical.' [Citations.]" (*Id.* at p. 283.) "A stipulation in open court has been held to be a 'proceeding' within the meaning of section 473, and subject to the remedial provisions of that section. [Citations.]" (*Id.* at p. 282.) "Vacation of the stipulated judgment would of necessity set aside the stipulation which was merged into the judgment." (*Id.* at p. 283.) The stipulated judgment here is a single document and the trial court had the authority to set it aside.

#### Respondent's Motion Was Timely

Appellant argues that the six-month limit for section 473 relief began to run in February of 2000, and that respondent's September motion was not filed within the time limit.<sup>8</sup> As determined in *Jacobs, supra*, 128 Cal.App.3d at p. 283: "Once judgment is

---

<sup>8</sup> The relevant text of section 473, subdivision (b) provides: "Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

entered ordering disposition of the property in accordance with the stipulation, the stipulation is merged into and superseded by the judgment. Therefore, in the case at bench, the measuring event for the purpose of a section 473 motion was the date of entry of the judgment.” Respondent’s motion was made shortly after the judgment was filed. The court’s determination that the motion was timely is supported by the evidence.

Appellant’s related argument, that respondent improperly delayed because she always suspected something was wrong with the judgment, is based on selective quotations from respondent’s testimony regarding her impressions of the entire negotiation that took place between the parties, including her general belief that she was not receiving a sufficient amount for the buy out of the family residence. Respondent did not realize that there was a mathematical mistake until she saw the final version of the judgment with all the handwritten changes.<sup>9</sup> The court’s determination that respondent filed her motion within six weeks of discovery of the error is supported by the evidence.

#### The Court Did Not Abuse Its Discretion By Granting Relief for Mistaken Addition

Relying solely on *Roller v. California Pacific Title Ins. Co.* (1949) 92 Cal.App.2d 149 (*Roller*), appellant argues that respondent is not entitled to relief because she caused the mistake. In *Roller*, appellant sought to avoid enforcement of a contract to purchase real property by arguing that the contract, drafted by appellant himself, had misled him. The court found that the contract language was clear, stating: “ ‘Mistake to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible.’ ” (*Id.* at p. 153.)

In this case, unlike *Roller*, the error is not apparent on the face of the document because the individual values of the stockholdings were not stated in the stipulated judgment.<sup>10</sup> Respondent’s counsel admitted it was his unintentional error, not

---

<sup>9</sup> Appellant’s insinuation that respondent was disappointed in the performance of the stock she received has no support in the record.

<sup>10</sup> We also reject appellant’s contention that respondent may not obtain equitable relief because she had not yet repaid the equalization payments. Respondent offered to

respondent's action, that caused the mistaken double posting of the Home Savings accounts. *Roller* is inapplicable here and the court's conclusion regarding the mistake is supported by the evidence.

#### The Finding of Mistake is Supported by the Evidence

Appellant argues that he bargained only for a fixed amount to be paid to respondent as an equalizing payment, and did not care what values were assigned to the various assets. His argument ignores the mathematical calculations in the judgment and the prior asset disclosure statement showing the values of each stock account.

Appellant's argument assumes that it was only coincidence that the value of the miscellaneous accounts including the Home Savings accounts on the disclosure statement matched the value when shown in the judgment without those two accounts. If appellant's argument is accepted, the only other assumption possible would be that the parties intended to charge respondent twice with the same amounts. The trial court, being familiar with this case, declined to make that assumption, and the evidence supports the determination that an inadvertent mistake was made.

#### There Was No Due Process Violation

Appellant's final argument is that he had inadequate notice that respondent would seek relief under subdivision (b) of section 473, because respondent's motion specified relief was sought for a clerical error. Appellant does not take into account the fact that respondent's supporting points and authorities, filed in December of 2000, also argued that the court could set aside the judgment under subdivision (b). Respondent also sent appellant a letter in December stating that she would agree to setting aside the judgment. The issue of subdivision (b) relief was argued at the March, 2001 hearing on respondent's motion. At that time, although he objected, appellant did not seek additional time to

---

repay the amounts at the hearing. In addition, relief here was granted under a specific statute, rather than the court's general equity powers. However, appellant's concern, particularly in light of the fact that respondent's attorney made the error, is valid. Unless the matter is quickly settled, respondent should promptly repay the funds to appellant.



respond to the subdivision (b) argument. Nothing would have changed had appellant been given more time to respond to the argument. There was no denial of due process.

#### CONCLUSION

The trial court's decision was supported by the evidence and was not an abuse of discretion. The order vacating the judgment is affirmed.

---

Marchiano, P.J.

We concur:

---

Stein, J.

---

Swager, J.